

anticonsumer, anti-innovation decisions do not establish a precedent that harms U.S. competitiveness for years to come.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

U.S. SENATE,

Washington, DC, December 12, 2005.

Hon. ROB PORTMAN,
U.S. Trade Representative,
Washington, DC.

DEAR AMBASSADOR PORTMAN: When the European Commission issued its competition decision against Microsoft in March 2004, I was one of many Members who expressed serious concerns about the decision and its impact on one of America's most innovative companies and its workers. Like many of my colleagues, however, I was also alarmed at the broader policy implications of the decision—that Europe would adopt a decision whose negative impact on trade was so clear, and which diverged so markedly from the Department of Justice's remedy addressing the same conduct. At the time, my hope was that the Commission's decision was the counter-example that proved the rule—namely, that comity was alive and well among the U.S. and its trading partners, and that the international community was increasingly moving towards adopting U.S.-style antitrust principles and rules.

Recent developments, however, suggest otherwise. Specifically, the December 7 decision of the Korean Fair Trade Commission (KFTC) against Microsoft—in which the KFTC not only followed the EU's market-distorting, anti-consumer approach, but appears to have gone substantially further than the EU remedies in several respects—makes me wonder whether the Microsoft case is not a unique case, but instead indicates the beginning of a trend among some of our key trading partners to use competition law as a means to pursue protectionist agendas or advance domestic industrial policy goals. If so, this should be of tremendous concern to the United States and your office.

I understand that your Office, and you personally, have been following this issue closely, and that you and other USTR representatives have expressed the Administration's strong concerns on these issues with your Korean counterparts on more than one occasion. As a Member who represents a State with dozens of leading innovative companies employing several hundreds of thousands of workers, please know that these efforts are greatly appreciated. Clearly, however, the results to date are not what we would have hoped.

I am deeply concerned that, without a strategy for addressing these issues more effectively—not only in the EU and Korea, but also more broadly—leading U.S. firms will increasingly face competition rulings in foreign nations that have little or no economic justification, but that make it much more difficult for U.S. industry to compete in global markets. With all of the other challenges facing the global trading regime at the moment, the United States can ill afford yet another barrier denying U.S. industry and workers the benefits of international trade.

I would therefore urge you to work with others in the Administration—including at the White House and the Departments of Justice, State, and Commerce—to develop and implement mechanisms for addressing these issues in a more coherent and effective fashion. At the same time, I would urge you and others in the Administration to take whatever steps are still available to you to advance the U.S. perspective in the Microsoft case, so that the anti-consumer, anti-in-

novation decisions do not establish a precedent that harms U.S. competitiveness for years to come.

I would appreciate your response to this letter and look forward to continuing our dialogue on these issues in the months ahead.

Sincerely,

PATTY MURRAY,

U.S. Senator.

FOURTH TERM FOR MAYOR TOM MENINO OF BOSTON

Mr. KENNEDY. Mr. President, I welcome this opportunity to congratulate our outstanding mayor in Boston, Tom Menino, on his reelection last month. The people of Boston love Tom, and for good reason.

Running for his fourth full term as mayor, Tom received an incredible 68 percent of the vote on election day, an extraordinary new mandate to continue his leadership that has meant so much to our city.

Tom is Boston's modern FDR, and at the end of this term he will become the longest serving mayor in Boston's 375-year history.

It is a distinction Tom Menino has earned through his unwavering dedication and commitment to the people of Boston.

For 12 years, Mayor Menino has worked day in and day out to unite our diverse city, make its neighborhoods and communities stronger, create fertile opportunities for businesses, and improve the quality of life for all the people of Boston.

He has fought to protect and expand housing for low-income families in the midst of the Nation's tightest housing market. He has never stopped working to meet the needs and protect the basic rights of every resident of our city—regardless of their race or background.

He has been a pioneer in education, creating Read Boston to help every child read at grade level by third grade and the Afterschool for All partnership so that learning doesn't end once school lets out for the day. He has fought to close the achievement gap for all of Boston's children and made Boston the first urban school district to have every school wired to the Internet.

Tom Menino has proven that America's great urban areas can succeed and thrive in this new economy, at a time when more and more of our Nation seems headed for the suburbs. Tom modestly describes himself as an urban mechanic, but it is far more accurate to say that he is an urban genius. Each day, he adds new proof that there are second and third acts for America's cities in our modern Nation.

Above all, Mayor Tom Menino has always worked tirelessly to ensure that Boston's brightest days lie ahead and that our city will continue to build on its incomparable history.

Tom has worked especially closely with our local colleges and universities to make certain that Boston remains the most prestigious destination in

America for young men and women seeking excellence in higher education.

He has welcomed our burgeoning biotech and medical research sectors in order to guarantee that Boston stays at the cutting edge of these highly promising industries of the future. This new century may well be the century of the life sciences, and Tom Menino is making sure that Boston helps write that history.

Next year marks the 100th anniversary of the inauguration of another visionary Mayor of Boston, my grandfather, John F. Fitzgerald, whose love of our city was legendary and whose commitment to progress was unchallenged.

Grampa Fitzgerald might not immediately recognize modern Boston as his beloved hometown, but he would be thoroughly at home with its vitality and its spirit of innovation, progress, and opportunity. Those qualities he fought so hard for a century ago are alive and well today, and he would be grateful that the city he loved so dearly is now in the capable hands of Mayor Tom Menino.

In the years ahead, I look forward to continuing to work with Mayor Menino to find solutions to the real and often daunting challenges facing Boston and all of urban America. No one is more committed to solving the big issues than Tom Menino.

He and his extraordinary wife Angela have made a remarkable team for Boston, and all of us in the city look forward very much to more of the unique brand of Menino leadership in the years ahead.

TRIBUTE TO JULIA SERNA

Mr. DOMENICI. Mr. President, I would like to honor and praise a longtime member of my staff, Julia Serna, who has served the people of New Mexico admirably. Julia works in my Las Cruces office and has been a member of my staff since April 1993. Julia will retire at the end of 2005.

Julia's positive outlook is remarkable, and her smile and zest for life is contagious. And her jovial attitude and eagerness to deal with challenges is commendable. So many of those from my home State have come to know and love Julia over the years. Julia has always been known as someone always willing to listen to my constituents and lend a helping hand.

During her work on immigration and veterans issues, she has gone to great lengths to help a great many people in my home State. Julia is loyal and is one on whom I have come to rely and depend. In that time, we have accomplished much, and I am extremely proud of those accomplishments. She will be greatly missed by me and my staff and by the people of southwestern New Mexico for whom she has worked for so many years.

Most importantly, Julia is my good friend. But the time has come. After over 12 years of service on my staff, I

know Julia's children Susie, Gabriel, Adolfo, and her grandchildren and great grandchild will be glad to be able to spend more time with her. As she begins her well-deserved retirement, I extend my best wishes to Julia and her family. Julia, for all you have done for me, and for all you have done for the people of New Mexico, you have my utmost respect and deepest gratitude. Thank you, for a job well done. We will miss those tamales at the office.

JUDICIAL PHILOSOPHY

Mr. HATCH. Mr. President I rise to make a few remarks about a matter relating to judicial philosophy that has been discussed by some during the course of this year in connection with the public debate over Supreme Court vacancies that have occurred this year.

Some have attempted to create a false conclusion by criticizing a school of judicial philosophy sometimes referred to as the "constitution in exile".

For example, earlier this year, my esteemed colleague from Delaware, Senator BIDEN, who, I understand, teaches constitutional law at the University of Delaware, entered into this debate. My friend from Delaware specifically asked us to reflect upon the judicial philosophy of one of our Nation's most respected Federal appellate judges, Chief Judge Douglas Ginsburg of the U.S. Court of Appeals for the District of Columbia Circuit.

I was recently in attendance at the DC Circuit for the formal swearing in of Judge Thomas Griffith and was once again impressed with the quality of jurists of this extremely important and influential court.

I commend Senator BIDEN for his support for the nomination of Judge Griffith.

As I will explain, I do take exception to some of the characterizations that the former chairman of the Judiciary Committee made about the views of Chief Judge Ginsburg.

The senior Senator from Delaware invited us to "read Judge Ginsburg's ideas about the 'Constitution in Exile' . . . [and to] read what Judge Ginsburg has written" about the "fifth amendment's taking clause, the non-delegation doctrine, the 11th amendment, and the 10th Amendment." Since the Chief Judge of the DC Circuit is one of our Nation's finest jurists, I welcomed this opportunity to reacquire myself with his opinions and writings. I was surprised and somewhat dismayed, then, to discover that this was such a short assignment.

Considering the sharp criticism by my Judiciary Committee colleague, Senator BIDEN, of Chief Judge Ginsburg's views as "radical," I was taken aback to discover how little he had actually written on the specified subjects.

It is no exaggeration to say that on most of these issues, Judge Ginsburg had written nothing of substance.

That being said, having considered what little he did write on these topics,

the characterization of his views as "radical" is, at best, a stretch.

If the research that I have seen is correct, Chief Judge Ginsburg has authored only two opinions that even refer to the takings clause of the Constitution. In neither did he decide the takings claim being presented.

In *Corporation of Presiding Bishop of the Church of Jesus Christ of the Latter-Day Saints v. Hodel*, 830 F.2d 374, 381, DC Cir. 1987, Chief Judge Ginsburg, writing for the court, noted that "[t]he question of whether courts, as opposed to legislative bodies, can ever 'take' property in violation of the Fifth Amendment is an interesting and by no means a settled issue of law." He determined, however, that the court did not need to decide this issue. Similarly, in *City of Los Angeles v. United States Dept. of Transp.*, 90 F.3d 591, D.C. Cir. 1996, unpublished, Chief Judge Ginsburg, writing for the court, determined that the takings claims were not ripe for resolution.

Many of my colleagues have denounced ideological decision-making by judges who are eager to promote their own speculative constitutional understanding at the expense of the American people's traditional views. I actually think that is a fair description of judicial activism, and it is clear that Chief Judge Ginsburg has not engaged in it. Quite the contrary, in these cases where he declined the opportunity to reach for and resolve constitutional questions prematurely, he exhibited the moderation and prudence we should expect of our judges.

Similarly, Chief Judge Ginsburg does not appear to have written anything of significance on the tenth or eleventh amendments. In the one and only case in which he even mentions the tenth amendment, *Chenoweth v. Clinton*, 181 F.3d 112, D.C. Cir. 1999, Chief Judge Ginsburg, writing for the court, did not address the merits of the claim because the court had determined that the party lacked standing. As for the eleventh amendment, Chief Judge Ginsburg's "radical" contribution was to note, in *Brown v. Secretary of Army*, 78 F.3d 645, 653, D.C. Cir. 1996, that a case referred to by the appellant citing the eleventh amendment was inapposite to the case before the court. This is hardly the controversial statement in support of State sovereign immunity one would expect given my colleague's remarks.

So, as far as I am aware, Chief Judge Ginsburg has not written substantively on the tenth amendment, the eleventh amendment, or the takings clause. How then can anyone fairly conclude that Chief Judge Ginsburg has such radical views about the constitutionally limited powers of the national government? Perhaps some are reading between the lines and seeing emanations and penumbras that others do not discern.

The only topic singled out for criticism by my friend from Delaware that I could find was, in fact, substantively

addressed by Chief Judge Ginsburg is the non-delegation doctrine. In a 1995 book review of David Schoenbrod's "Power Without Responsibility", Chief Judge Ginsburg employed the term "Constitution-in-exile."

Apparently some liberal critics of the President's judicial nominees have seized on this expression, perhaps in the hope that it will scare the American people into fearing some super-secret rightwing led by wayward judges.

Of course, this is nonsense.

But it is worth noting that the many of the critics who talk today about the Constitution-in-exile have completely unmoored that term from Chief Justice Ginsburg's original formulation.

In an article in the journal *Regulation*, Chief Judge Ginsburg wrote the following:

[F]or 60 years the non-delegation doctrine has existed only as part of the Constitution-in-exile, along with the doctrines of enumerated powers, unconstitutional conditions, and substantive due process, and their textual cousins, the Necessary and Proper, Contracts, Takings, and Commerce Clauses. David Schoenbrod, "Power Without Responsibility: How Congress Abuses the People Through Delegation," *Regulation Magazine* (1995 No. 1) (Book Review), at 84.

He went on to explain that, "The memory of these ancient exiles, banished for standing in opposition to unlimited government, is kept alive by a few scholars who labor on in the hopes of a restoration, a second coming of the Constitution of liberty—even if perhaps not in their own lifetimes." *Id.*

So two sentences equal a judicial scheme to advance substantive economic liberty and restrain Federal authority? For a careful reader, it is clear that Chief Judge Ginsburg promotes no such agenda. First, he was referring only to the non-delegation doctrine, the supposedly radical proposition that Congress, not unelected bureaucrats, should be responsible for making our laws. And second, Chief Judge Ginsburg was writing a book review, and his reference to those "few scholars" was obviously not a reference to himself because he had not written on this subject.

His point was that the author of the book he was reviewing was misguided in thinking that the Supreme Court was likely to put teeth back into the non-delegation doctrine. Far from arguing that courts should strip Congress of their authority to delegate its lawmaking authority, he suggested that it would be more productive to ask Congress to change the way it delegates lawmaking authority to administrative agencies. Chief Judge Ginsburg was Administrator of Information and Regulatory Affairs of the Office of Management and Budget during the Reagan administration. This is the office with-in the Executive Office of the President charged with reviewing all Federal regulations. So Chief Judge Ginsburg has considerable experience and expertise in these matters.

In the referenced book review, Chief Judge Ginsburg endorses then-Judge